Supreme Court, U.S.
FILED

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No.

In the
Supreme Court
of the
United States

OCTOBER TERM, 1998

JULIA VITULLI ISGRO,

Petitioner,

versus

THE NEW YORK STATE FRESHWATER WETLAND APPEALS BOARD

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, consistently with the Due Process clause of the Fifth Amendment, a state may as part of a regulatory scheme involving freshwater wetlands apply a *unique remedy* [*de St. Aubin v. Flacke* 505 N.Y.S.2d 859, 496 N.E.2d 879, 68 N.Y. 2d 66] which requires, as an *absolute* prerequisite to the filing of a suit charging an unconstitutional taking of freshwater wetland, that the owner first undertake filing for a permit, when the evidence establishes that a taking has occurred, namely, that the freshwater wetland was and is being intentionally flooded for public use, service and benefit, from which it can also be concluded that the filing of the permit represents a futile effort?

2. Whether, consistently with the Due Process clause of the Fifth Amendment, a state need not provide for an evidentiary proceeding, such as that provided by ECL 24 § 1104, which affords an owner an opportunity *to be heard* and *to hear why* with respect to the designation process and the designation of the owner's parcel as a freshwater wetland?

3. Whether, consistently with the Equal Protection clause of the Fourteenth Amendment, a state may purchase selected high quality freshwater wetlands, prior to the filing for permits by the owners of the selected freshwater wetlands and prior to a subsequent challenge of the wetland designation by said selected owners, without providing for equivalent treatment of the remaining uncompensated owners?

4. Whether, consistently with the Due Process clause of the Fifth Amendment, a state may apply a *30 day* statute of limitation, such as that set forth in ECL § 24-0705 and ECL § 24-1103, to a challenge of the

wetland designation process, a resulting wetland designation and/or the commencement of an action *asserting a* taking of the designated land[*Arnold v. Hudson River R.R. Co.*, 49 Barb. 106, 55 N.Y. 661]?

5. Whether ECL Article 24, in its entirety or one or more provisions, fails to provide a fair, open and effective process for the protection of private property rights which accords with the Due Process clause of U.S. Const. amend. V. and the Due Process and Equal Protection clause of the U.S. Const. amend. XIV § 2.

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The New York State Court of Appeals has decided a constitutional due process and equal protection question involving property, land and its uses, services and benefits, in a way which conflicts with the U.S. Constitution and the decisions of the United States Supreme Court and the Federal Courts. 10

There is present a need, on behalf of certain owners of freshwater wetland, to consider whether Article 24 of the New York State Environmental Conservation Law, as presently interpreted and applied, provides the requisite due process and equal protection, that is, a process which is fair, open and directed to the continuing protection of constitutionally guaranteed property rights. The Questions Presented For Review focus on the process in ECL Article 24, particularly, the presence or absence of certain provisions and the interpretation of certain of those provisions by the Courts of New York, which provisions or interpretations interfere guaranteed property rights.. 12

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A writ of certiorari is respectfully sought to review the order of the Court of Appeals of New York by which the appeal was dismissed upon the ground that no substantial constitutional question is directly involved.

DECISIONS AND ORDERS BELOW

Order of the New York State **Court of Appeals**, dated December 4, 1997.[App. A, p.1a]

Order and Decision of the New York State Freshwater Wetland Appeals **Board**, dated August 1, 1995.[App. B, p.2a.-5a]

Decision and Order of the New York State **Supreme Court**, Richmond County, dated February 14, 1996.[App. C , p.6a-13a]

Decision and Order of the New York State **Appellate Division**, Second Department, dated May 12, 1997.[App. D, p.14a]

BASIS FOR JURISDICTION

The New York State Court of Appeals on December 4,1997 entered an Order [App. A, p. 1a]which dismissed the appeal upon the ground that no substantial constitutional question was directly involved.

The controversy arises out of the *due process* provided for in Article 24 of the Environmental Conservation Law, including its implementation,

which results in a continuing taking of property, land, for public use, benefit and service, without just and fair compensation to the owner.

The United States Constitution, Amendment V provides that

> No person shall ... be deprived of life, liberty, or property, without due process of law... nor shall property be taken for public use, without just compensation.(App. E, p 15a)

The United States Constitution, Amendment XIV (1) provides that

> ...No State shall...deprive any person of ...property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.(App. E, p.15a)

There are special and important reasons for this Court to consider this writ of certiorari, including the fact that a state court of last resort has decided an important question of federal law in a manner that conflicts with the U.S. Constitution and applicable decisions of federal courts and this Court, and questions of law which should be settled by this Court.

Federal questions of law were specifically raised before the Freshwater Wetland Board of Appeals and through the appeal process to the New York State Court of Appeals. Appellant respectfully notes that the details with respect to each court are provided under the section entitled **THE CONSTITUTIONAL CHALLENGES BELOW.**

STATEMENT OF THE CASE

In 1981, Petitioner inherited certain parcels of land from her father, purchased in 1961, and which included Lot 24 (40ft. x100ft.), the wetland parcel which is the subject of this appeal. Petitioner continues to pay the real estate taxes as due on Lot 24. In 1975, ECL Article 24 became law. In 1986, Lot 24 was designated a freshwater wetland, for the first time, on the Richmond County Tentative Freshwater Wetland Map. Thereafter, also in mid-1986, a *public hearing* was held. On September 1, 1987, the final wetland map, which included Lot 24, was filed with the Richmond County Clerk. In 1987, ECL Article 24 was amended to include remedial § 24-1104 under which Petitioner filed the first action in this matter on June 2, 1992.

Petitioner maintains and has maintained that a physical taking comprising the intentional flooding of her property [land] and a regulatory taking by the People of the uses, services and benefits derived from and provided by her property[land] has occurred, is occurring and will continue to occur due to the designation of her land, *Lot 24*, as a freshwater wetland. [App. G, p.48a and App. H, p.56a] The takings have occurred and continue to occur, contrary to the admonitions of the Fifth Amendment, and, notwithstanding the fact that *ECL Art. 24* may be rescinded, amended or declared unenforceable, fair compensation is due her.[App. G, p.54a]

THE CONSTITUTION and THE STATUTE

The 5th Amendment and 14th Amendment
of the United States Constitution
and
NY Environmental Conservation Law Article 24

THE CONSTITUTIONAL CHALLENGES BELOW

The basis for the appeals comprised a challenge to the administrative and judicial interpretation, application and implementation of the New York State Environmental Conservation Law (ECL) - Article 24 - Freshwater Wetlands to certain lands in the City of New York, Borough of Richmond, also known as Staten Island.

The *Freshwater Wetland Appeals Board State of New York.*

On June 12, 1992, Petitioner filed an action in this matter under ECL § 24-1104.

The Department of Environmental Conservation [DEC] had the burden of proof.[§ 24-1104] The evidence comprised exhibits and testimony by a DEC witness under direct examination and cross-examination. The uncontested evidence established, among other facts, that the freshwater wetland identified as Dongan Hill [NA-9][118 acres], which includes Lot 24, was being and is being flooded for a public use, and for the service and benefit of the public.[App. H, p.62a] The DEC has known and knows, without limitation, that NA-9, which includes Petitioner's land is functioning as a "storm water retention area". [App. H, 62a] This evidence was established before the Board and available for consideration by the Courts.

It was also established that Lot 24 was not designated a freshwater wetland merely upon its freshwater wetland characteristics but on the

characteristics of the entire 118 acres of the wetland, owned by others, known as Dongan Hill. [App.H,60a]

Moreover, it was established that Lot 24 is presently zoned for the construction of one, two or three family homes. [App. H, p.61a]

The Board did not address the taking [App. H, p, 225a] question, notwithstanding the fact that it was authorized to exercise the power specifically set forth in ECL § 24-1103 which provides in § 2a that

> ...the board shall limit its review to whether the order or decision is:
>
> a. in conformity the constitution and laws of the state and the United States... [App. F, p.22a]

The Board sustained the order and decision of the Commissioner of the DEC, as it applied to lot 24.

Supreme Court of the State of New York, County of Richmond.

The order and decision of the Board was appealed to the Supreme Court of Richmond County, in an Article 78 proceeding. There was no other provision in ECL Article 24 for review of the Board's order and decision.

In its decision " the court notes that ... [Petitioner's] attorney stated at the hearing that the designation of a piece of property as a wetland has been admitted as taking [flooding] by the State of New York and that he asked that FWAB to pay the

...[Petitioner's] for...[her] property " and cites " *De St. Aubin v. Flacke* 505 N.Y.S.2d 859, 496 N.E.2d 879, 68 N.Y. 2d 66,wherein the Court of Appeals observed that:

> Since wetlands restrictions are far more stringent than most other regulation--restricting development *per se* -- the Legislature has provided property owners with a unique remedy against an unconstitutional taking within the context of the regulatory scheme itself. (Id, at 70)

but that

> A landowner who claims that land regulation has effected a taking of his property bears the heavy burden of overcoming the presumption of constitutionality that attaches to the regulation and of proving every element of his claim beyond a reasonable doubt (id, at 76).[App. C, p.12a]

Petitioner has taken note of the fact that the Court of Appeals' opinion in *De St. Aubin v. Flacke* 505 N.Y.S.2d 859, 496 N.E.2d 879, 68 N.Y. 2d 66 is cited in the *Court's* Decision. In the context of the presentation and citation of that decision, it was reasonable to conclude that the *Court* was, indeed, also deciding that, in this case, Petitioner should have adopted the 'unique remedy' discussed by the Court of Appeals.[App.H,55a]

More particularly, it was stated in the Brief filed in the Appellate Division that

since it is fairly assumable that was *a holding by the Court below, that holding* is also appealed to this Appellate Court. [App. H, p 55a]

The Court dismissed the petition and entered judgment against Petitioner.

Supreme Court of the State of New York Appellate Division : Second Judicial Department.

The judgment of the New York State Supreme Court, Richmond County was appealed to the Supreme Court of the State of New York Appellate Division : Second Judicial Department, including extensive briefing on the following points:

The mandatory language requires that "questions concerning the use of the property must be considered initially by the Department of Environmental Conservation ... within the confines of an application for a permit." *De St. Aubin v. Flacke* 505 N.Y.S.2d 859, 496 N.E.2d 879, 68 N.Y. 2d 66. However, not all issues relating to use and/or the nonexistence of a use are necessarily ripened through a permit process. For instance, the *Department,* through mere inspection of its experience and its particular knowledge of the freshwater wetland facts applicable to the parcel in question can determine that no uses are or would be available to the landowner because any reasonable use of the land would be inconsistent with the Statutory mandate [App.F,p.31a](which indeed occurred through the testimony of the *Department's* expert in this matter [App. H, p.59a]).

The granting of a Permit to Petitioner would be inconsistent with the Class I designation [App. H,

p.56a and App. F, p.30a] due to the high Freshwater Wetland value assigned to the *Designated Land* and would also be inconsistent with the statutory purpose which includes the significant benefits and uses that the Freshwater Wetland *NA-9* provides to the People which would be adversely affected. Further, an applicant, such as, Petitioner, would encounter difficulty in stating that, as required, the carrying out of activities others carry out on their land would be consistent with the statutory purpose. [App. F, p.30a-31a]

Moreover, under such circumstances, to require that Petitioner apply for a permit would be an exercise in futility. The law does not require that one undertake a futile mission. *Jorling v. Freshwater Wetland Appeals Board*, 534 N.Y.S. 2d 966,973.[App. D, p.14a]

The Permit question was also raised and discussed at the oral hearing.

Article 24 fails to set forth an early process, that is, a *proceeding* which provides for the constitutional due process right *to be heard* and *to hear why*. This also bears upon the permit process because this failure deprives one of the opportunity to be in possession of information, in evidentiary form, such as the flooding of his or her properties, necessary to arrive at informed decisions about issues, such as, the futility of applying for a permit and, indeed , the inability to state, as required in the permit process, that any reasonable use of Petitioner's land would not be inconsistent with the intent of *Article 24*.[App. F p. 19a]

Certain wetland owners are singled out and must bear all the burden for providing uncompensated uses, benefits and services to the People. As to those owners, *ECL Art. 24* causes a significant, unfair and unwarranted servitude and an unconstitutional denial of equal protection under the 14th Amendment.Under the Environmental Quality Bond Act (EQBA), certain freshwater wetland owners receive compensation for a taking of a freshwater wetlands without the need to apply for a permit.[App. G, p. 26a]

The thirty (30) day statute of limitation to appeal is measured from the filing date of the *Richmond County Freshwater Wetlands Map.* It is evident that the time limitation furthers no substantial, if any, State interest. In effect, the limitation misleads and interferes with the ability to appeal a constitutionally defined and protected continuous right to property. The thirty day limitation, or any limitation, unlawfully prevents an owner of property from exercising a continuous right in such property. *Arnold v. Hudson River R.R. Co.*, 49 Barb. 106, decided December 23, 1873.[App. G, p.49a]

The Court affirmed the Judgment of the Supreme Court of Richmond County.

Court of Appeals of the State of New York.

The decision of the Appellate Division : Second Department was appealed the Court of Appeals.

The Court ordered that the appeal be dismissed *sua sponte* upon the ground that no substantial constitutional question was directly involved.

The Constitutional questions were reasserted in petitioner's Jurisdictional Statement and Comments-Isgro [App. G, p.32a-45a]

REASONS FOR GRANTING THE WRIT

The New York State Court of Appeals has decided a constitutional due process and equal protection question involving property, land and its uses, services and benefits, in a way which conflicts with the U.S. Constitution and the decisions of the United States Supreme Court and the Federal Courts.

The 5th Amendment of the United States Constitution states that property (which includes physical possession of things, such as land, and derived uses, services and benefits) shall not be taken by the State for a public use without just compensation. The Declaration of Policy § 24-0103, by the very words" preserve, protect and conserve " freshwater wetlands and benefits derived therefrom, to " prevent despoliation and destruction of freshwater wetlands,.... secure the benefits of freshwater wetlands " describes a taking. Therefore, it should be the State that in fact bears the burden of establishing what economically viable uses remain available to wetland owner. If that is a reasonable argument, and it is respectfully submitted that it is, Petitioner should face a fair process to establish the facts of a taking, such as, by the intentional flooding for the public good [use, service and benefit].

The New York State Court of Appeals has decided a federal question in a way which conflicts with the decisions of the federal courts. More particularly, contra to the position taken by the

federal courts, as discussed below, the New York Court of Appeals ruled that the filing for a permit is prerequisite to establishing a taking, notwithstanding, as shown, of the futility of the act.

The Court in *Hage v. U.S.*, 35 Fed. Cl. 147,164(1996) stated

> [t]he court determines, analogous to *Stearns*, that plaintiffs need not apply for a permit if plaintiffs can establish that the procedure to acquire a permit is so burdensome as to effectively deprive plaintiffs of their property rights. See also *Loveladies Harbor, Inc. v. United States*, 15 Cl.Ct. 381, 386-387 (1988) (summary judgment denied),21 Cl.Ct. 153 (1990), aff'd 28 F. 3d 1171 (Fed.Cir. 1994).

Also the Court in *Broadwater Farms Joint Venture v. U.S.*, 35 Fed.Cl.232, 236 (1996) stated

> [t]his court has held that it is not necessary to apply for a permit if the process is so burdensome or futile that it effectively deprives the property of value. *Hage v. United States, 35 Fed.Cl.147,164 (1996).*

A taking claim is ripe when the issues are fit for judicial decision and hardships occur if the court declines to hear the claim. *Hage* 35 Fed.Clk.at 163 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed. 2d 681(1976). Based upon the facts of the present case, a taking claim is ripe, notwithstanding the fact that Petitioner has not filed for a permit.

The heavy burden of overcoming the presumption of constitutionality that attaches to the regulation and of proving every element of the owner's claim beyond a reasonable doubt, as stated in *De St. Aubin, supra*, is, indeed, insurmountable without a prior proceeding before the Commissioner, as was provided for under § 24-1104. A freshwater wetland owner should *be heard* and *hear why* and, thereby, be sufficiently informed about the facts to enable the owner to make an informed decision concerning the permit process or any other available course of action.

If Petitioner bears a burden beyond a reasonable doubt, it is not unreasonable to argue that Due Process requires a clear opportunity *to be heard* and to *hear why* before the purported permit requirement

There is present a need, on behalf of certain owners of freshwater wetland, to consider whether Article 24 of the New York State Environmental Conservation Law, as presently interpreted and applied, provides the requisite due process and equal protection, that is, a process which is fair, open and directed to the continuing protection of constitutionally guaranteed property rights. The Questions Presented For Review focus on the process in ECL Article 24, particularly, on the presence or absence of certain provisions and the interpretation of certain of those provisions by the Courts of New York, which provisions and interpretation interfere with or deny the protection of constitutionally guaranteed property rights.

If this application for a Writ of Certiorari is not considered and decided, the courts, including the

courts of claims, will decline to entertain a freshwater wetland "taking" claim, if the wetland owner has not filed for a permit.

It has been and continues to be an act, not in accordance with a process that is fair, open and directed to the continuing protection of constitutionally guaranteed property rights, for the DEC not to have acknowledged that, for an owner of land located within NA-9, the permit process could only establish a foregone conclusion, namely, a denial. Most troubling, however, is the fact that due to the intricacies, time required and cost of such a process, while being touted to be a requirement, the permit process initially leads to an involuntary servitude and ultimately to an involuntary abandonment of property rights, that is, the requirement is calculated to lead to the involuntary forfeiture of property rights without the opportunity for fair, clearly defined, and expeditious due process.

There is little doubt that a wetland regulation can and will effect a taking. As stated above, § 24-0103 statutorily effects a taking by its very words. The very explanation in De St. Aubin, *supra*, that Article 24 restricts development effects a taking, particularly of land that is zoned for homes. [App. E, p. 12a] Any zoning regulation which respects the Constitution sets out activities which allow for the use of the of the regulated land. Article 24 contains no such parameters.

Significantly, it is also noted that, in fact, Petitioner was never a party to a proceeding before the Commissioner, other than the one initiated by Petitioner under § 24-1104, which resulted in an

Order or Decision. A public hearing, such as that held in 1986, was and is not a "proceeding" by definition. This relates to the question of Petitioner's right *to be heard* and *to hear why* ,discussed below.

If this application for a Writ of Certiorari is not considered and decided, the courts, including the courts of claims, will decline, under all circumstances, to entertain a freshwater wetland "taking" claim, if the wetland owner has not filed for a permit.

CONCLUSION

Certiorari should be granted.

Respectfully Submitted,

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Appendices

Orders and Decisions Below

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(Publication page references are not available for this document.)

In the Matter of Julia Vitulli Isgro,
Appellant,
v.
New York Freshwater Wetlands Appeals Board, Respondents.
Mo. No. 1389 SSD 93.
Court of Appeals of New York.
Dec. 4, 1997.

Appeal dismissed without costs, by the Court sue sponte, upon the ground that no substantial constitutional question is directly involved.

APPENDIX A

FRESHWATER WETLANDS APPEALS BOARD
STATE OF NEW YORK
Julia Vitulli Isgro,

Appellant,

-against-

ORDER AND DECISION
Index No 92-13
Wetland NA-9

Thomas C. Jorling, Commisasoner of
The New York State Department of
Environmental Conservation,

Respondent,

----------X

INTRODUCTION

The appellant in the instant proceeding filed an appeal with the Freshwater Wetlands Appeals Board seeking relief pursuant to the provision of Environmental Conservation Law (ECL) S24-1104.

ECL §24-1104 was enacted in 1987 as a result of the filing of a final tentative freshwater wetland map in Richmond county in 1981 and a subsequent filing of another tentative wetlands map in 1986 which doubled the acreage of land designated as wetland. The law provides procedural remedies to certain private landowners whose parcels were not on the 1981 tentative wetlands map but were included on the final map filed on September 1, 1987.

A hearing in this and a related matter(1) was held on November 2, 1994. At the conclusion of the designation portion of the cases, and after due

(1)The designation portion of this appeal was heard with FWAB Index No. 92-12, Vito Vitulli v. DEC, and the Board's Bench Ruling on designation applied to both cases.

deliberation, the Board upheld the Department of Environmental Conservation's (DEC) mapping of the subject properties as wetland. Immediately thereafter, a hardship hearing was held.

We find, after review of all of the evidence in this case, that the appellant has failed to cross the hardship threshold established by previous decisions of this Board. This Board has previously held that in order to prove unnecessary hardship, an appellant must demonstrate that she was in some way adversely affected by the double magping process. on Staten Island. Bisignano v. Jorling, Index No. 87-4, (June 19, 1989). Initially, a property owner must be able to cross a "reliance threshold" by demonstrating that she has constructively or actually relied upon the fact that a parcel of land was not included on the 1981 tentative freshwater wetlands map (Id). Such reliance can be demonstrated if a parcel was actually purchased between the filing of the first map in 1981 and the filing of the final map in 1987. Id., JRA Design Build. Inc. v. Jorling, FWAB 87-5, 87-6, August 18, 1989, aff'd 147 Misc.2d 165 (Sup. Ct. Richmond Co.).

The fact that a property owner owned a parcel prior to the filing of the 1981 tentative freshwater wetlands map does not, in and of itself, rule out an eventual hardship determination by the Board. However, an individual must be able to demonstrate that she has constructively or actually relied upon the 1981 wetland map in some way. Such reliance might be established if, for example, a property owner had taken substantial steps toward development of the parcel after the 1981 map was filed but prior to the filing of the 1986 tentative map or 1987 final map, only to be halted in her efforts because of the

inclusion of the property on the map. Mungavin v. Jorling, Index No. 87-35, (Auguat 18, 1989), Garsson v. Jorling, Index No. 87-52 (December 26, 1990.

After the reliance threshold has been crossed, the Board must examine the additional elements of hardship articulated by the appellant, balance those elements against the values and benefits of the wetland area in question, and determine whether the hardship outweighs the value such that some form of relief can be granted. Bisignano, Smith v. Jorling, FWAB 87-103 (June 28, 1990).

Having reviewed the testimony and information submitted, we find that the appellant has not met the threshold requirement for establishing an unnecessary hardship in this case. The property at issue here was acquired by Costantino Vitulli in 1961 and passed by inheritance to the appellant herself in 1978. The appellant therefore could not have relied on the 1981 map in acquiring the property, nor did she undertake to develop the property prior to the filing of the 1986 tentative wetlands map. While she might wish to sell or develop the property now or in the future, she is in the same position as any other landowner in New York State whose property has been mapped as a wetland.

We must therefore deny the appellant's request for relief pursuant to the hardship provisions of ECL Section 24-1104 .(2) We hereby sustain so much of the Order and Decision of the Commisaioner of the Department of Environmental Conservation as included Block 3768, lot 24 as freshwater wetlands

(2) The appellant is not without some recourse. She can apply for permits to develop all of her property on Staten laland, and, if permits are denied, seek relief pursuant to the taking provisions of ECL § 24-0705(7) in the Court of Claims.

and/or regulated adjacent area, on the final freshwater wetland map filed in Richmond County on September 1, 1987

IT IS S0 ORDERED.

Dated: August 1st, 1995

s/ Peter McHugh

Acting Chairman

s/Maxine Spierer

Member

s/Robert Cook

Member

SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF RICHMOND

----------X IAS PART I

In the Matter of the Application of

JULIA VITULLI ISGRO,

Petitioner,

for a judgment *pursuant* to CPLR Article 78 Vacating and Remanding Decision and Order *of* Freshwater Wetlands Appeals Board in the Appeal of Julia Vitulli Isgro FWAB of Julia Vitulli Isgro FWAB Docket No. 92-12

v.

THE NEW YORK FRESHWATER WETLANDS APPEALS BOARD ,

Respondent.

----------X

Present

HON. LOUIS SANGIORGIO

DECISION AND ORDER

Index No. 8511/95

Cal. Nos. 3282 3457

The following papers numbered 1 to 4 used on this motion this 12th day of December, 1995.

	Papers Numbered
Petition	1
Verified Answer	2
Respondent's Memorandum of Law	3
Replying Affirmation	4

APPENDIX C

ISGRO v THE NEW YORK FRESHWATER WETLANDS APPEALS BOARD

Upon the foregoing papers, the petition calendared under numbers 3282 and 3283 are consolidated for disposition and are both denied. Respondent's motions calendared under numbers 3457 anc 3458 had previously been granted to the extent of extending the return date of the petitions.

In 1978 the petitioners inherited certain real property in Richmond County which was originally acquired by Costantino Vitulli in 1961. This real property has been designated as Freshwater wetlands by the New York State Department of Environmental Conservation (the DEC) and the petitioners sought review of the freshwater wetlands designation pursuant to Environmental Conservation Law (ECL) § 24-1104. ECL § 24-1104 authorizes the respondent Freshwater Wetlands Appeals Board (FWAB) to review otherwise time-barred designations of real property in Richmond County as wetlands if such real property was not designated as wetlands when Richmond County's tentative fresh water wetlands map was filed in 1981. ECL § 24-1104(1) states that the FWAB shall hold a public hearing, and also states that where, as here, the parcels of land are less than ten thousand square feet in area, the DEC in such hearing "shall have the affirmative burden of demonstrating by clear and convincing evidence that the parcel or part thereof under review is a wetland." ECL § 24-1104(1) further states that the FWAB "shall review such designation to determine if there are unnecessary hardships in the application of such designation."

Petitioner's hearing was held on November 2, 1994 and in an order and decision dated August 1, 1995, the FWAB upheld the DEC's designation of the subject properties as wetlands. With respect to the hardship issue, the FWAB found that neither petitioner met the "reliance threshold" by demonstrating that they were in some way adversely affected by the double mapping process of Richmond County.

The FWAB claims that the subject petitions raise the "substantial evidence" question of CPLR 7803(4) and that where such a question is raised, CPLR 7804(g) requires this court to transfer the proceedings to the Appellate Division, First Department. CPLR 7804(g) states that any transfer thereunder is to the appellate division...within the judicial department embracing the county in which the proceeding was commenced." Since these proceedings were commenced in Richmond County, any transfer under CPLR 7804tg) would be to the Appellate Division, Second Department, not to the Appellate Division, First Department. However, where a petition does not raise the issue as to whether a respondent's determintion is supported by substantial evidence, no transfer-should occur (Connors v New York State Department of nvironmental Conservaton, 178 AD2d 595)

Here, both petitions clearly state that "all matters hereinafter raised by Petitioner relate to questions of Law and Equity" (petitions, paragraph six). Moreover, both petitions state that "(i)t appears

that the Board misinterpreted and misapplied the designation concept because of the fact that petitioner, ultimately...did not challenge the designation." (petitions, paragraph thirteen, page nine).

The hearing transcript, at page 118, indicates that petitioners' attorney agreed with the DEC's designation of the subject properties as wetlands because he had "no choice." The hearing transcript, at page 121, also indicates that petitioners' attorney conceded that the subject properties were properly designated as wetlands. The hearing transcript further indicates, at page 115, that, despite being advised of his opportunity to prove that the "whole wetland is not a wetland" and "the opportunity to prove that (the subject properties are) not in the wetland, when asked if he believed if the subject properties were properly designated as wetlands, petitioners' attorney replied, at page 123:

> " I believe that I have no ability to dispute that.Therefore, I have to accept it, yes."

As to the unnecessary hardship issue, the hearing transcript indicates that petitioners, attorney stated, at page 11(1) that "(a)ll the requirements to

(1)The hearing transcript is divided into two transcripts, both beginning at page one. The first covers the designation portion of the hearing held the morning of November 2, 1994. The second covers the unnecessary hardship portion of the hearing held in the late afternoon of November 2, 1994.

establish hardship are in the public record."The hearing transcript also indicates that petitioners' attorney stated, at page 12, that he didn't think there was "any financial burden with respect to (petitioner) Julia(Vitulli Isgro)" and

> "as far as (petitioner) Vito (Vitulli) is concerned, there is a financial burden and we will not discuss that. Your either aeeept it or you don't acccept it"

Lastly, at page 18 of the hearing transcript petitioners' attorney claimed "that we have established that we have no viable economic use available to us."

Petitioners argue that they were denied the "ability" to challenge the wetland designation "because of the manner in which the designation was implemented by the DEC" (petitions, paragraph thirteen, page nine). However, they were clearly fully apprised of the proof to be considered, were given an opportunity to cross-examine witnesses, inspect documents, and offer evidence in rebuttal (see, Jorling v Freshwater Wetlands Appeals Board), 147 Misc 2d 880, 885), but petitioners' attorney conceded that the designation of the subject properties as wetlands was proper.

Petitioners also argue that the FWAB'S "reliance threshold" is inappropriate with respect to the unnecessary hardship portion of the hearing. The FWAB's August 1, 1995 determination stated that:

ISGRO v THE NEW YORK FRESHWATER WETLANDS APPEALS BOARD

> "Initially, a property owner must be able to cross a (reliance threshold) by demonstrating that she has constructively or actually relied upon the fact that a parcel of land was not included on the 1981 tentative freshwater wetlands map"

but

> "The fact that a property owner owned a parcel prior to the filing of the 1981 tentative freshwater wetlands map does not, in and of itself, rule out an eventual hardship determination by the Board.However, an individual must be able to demonstrate that she has constructively or actually relied upon the 1981 wetland map in some way". (FWAB determination, page 2).

The FWAB found that the petitioners had not met the "reliance threshold" because the subject properties were acquired in 1961 and passed to the petitioners by inheritance in 1978. Thus, the petitioners would not, and could not, have relied on the 1981 map in acquiring their properties, nor did they undertake to develop their properties prior to the filing of the 1986 map.

The "reliance threshold" used by the FWAB in determining "unnecessary hardship" has been given judicial approval (see, Jorling v Freshwater Wetlands

Appeals Board, 147 Misc 2d 165) and there is no question that the petitioners fail to meet it.\

The court notes that petitioners' attorney stated at the hearing that the designation of a piece of property as wetland has been admitted as being a taking by the State of New York and that he asked the FWAB to pay the petitioners for their property. In de St. Aubin v Flacke, (68 NY2d 66), the Court of Appeals observed that:

> "Since wetlands restrictions are far more stringent than most other regulations--restricting development per se--the Legislature has provided property owners with a unique remedy against an unconstitutional taking within the context of the regulatory scheme itself." (Id, at 70), but that
>
> "A landowner who claims that land regulation has effected a taking of his property bears the heavy burden of overcoming the presumption of constitutionality that attaches to the regulation and of proving every element of his claim beyond a reasonable doubt" (Id,at 76)."

On these Article 78 proceedings the petitioners have failed to raise any legal argument to sustain the requested relief.

Accordingly, it is

ORDERED that the petitioners' applications are denied and their petitions are dismissed; and it is further

ORDERED that the Clerk is directed to enter jugdment accordingly.

E N T E R,

"_s/_____"

J.S.C.

Dated: February 14, 1996.

(Cite as: 658 N.Y.S.2d 893)

In the Matter of Julia Vitulli ISGRO,
Appellant,
v.
NEW YORK FRESHWATER WETLANDS
APPEALS BOARD, Respondent.

Supreme Court of New York, Appellate
Division,
Second Department.
May 12, 1997.

William G. Isgro, Paramus, NJ, for appellant.

Dennis C. Vacco, Attorney-General, NewYork City (Michael Bogin and Joan Corbo, of counsel), for respondent.

In a proceeding pursuant to CPLR article78 to review a determination of the New York Freshwater Wetlands Appeals Board, the appeal is from a judgment of the Supreme Court, Richmond County (Sangiorgio, J.),dated February 14, 1996, which dismisses the petition.

ORDERED that the judgment is affirmed, with costs.

The petition was properly dismissed (see,Jorling v. Freshwater Wetlands Appeals Bd.,147 Misc.2d 165, 554 N.Y.S.2d 966; Matter of Jorling v. Freshwater Wetlands Appeals Bd.,147 Misc.2d 880, 556 N.Y.S.2d 1017.

O'BRIEN, J.P., and COPERTINO, THOMPSON and KRAUSMAN, JJ., concur.

APPENDIX D

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV, § 1 [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

§ 24-0701. Permits

1. After issuance of the official freshwater wetlands map of the state, or of any selected section or region thereof, any person desiring to conduct on freshwater wetlands as so designated thereon any of the regulated activities set forth in subdivision two of this section must obtain a permit as provided in this title.

2. Activities subject to regulation shall include any form of draining, dredging, excavation, removal of soil, mud, sand, shells, gravel or other aggregate from any freshwater wetland, either directly or indirectly; and any form of dumping, filling, or depositing of any soil, stones, sand, gravel, mud, rubbish or fill of any kind, either directly or indirectly; erecting any structures, roads, the driving of pilings, or placing of any other obstructions whether or not changing the ebb and flow of the water, any form of pollution, including but not limited to, installing a septic tank, running a sewer outfall, discharging sewage treatment effluent or other liquid wastes into or so as to drain into a freshwater wetland; and any other activity which substantially impairs any of the several functions served by freshwater wetlands or the benefits derived therefrom whichh are set forth in section 24-0105 of this article. These activities are subject to regulation whether or not they occur upon the wetland itself, if they impinge upon or otherwise substantially affect the wetlands and are located not more than one hundred feet from the boundary of such wetland. Provided, that a greater distance from any such wetland

may be regulated pursuant to this article by the appropriate local government or by th department, whichever has jurisdiction over such wetland, where necessary to protect and preserve the wetland.

3. The depositing or removal of the natural products of the freshwater wetlands by recreational or commercial fishing, shellfishing, aquaculture, hunting or trapping shall be excluded from regulated activities, where otherwise legally permitted and regulated.

4. The activities of farmers and other landowners in grazing and watering livestock, making reasonable use of water resources, harvesting natural products of the wetlands, selectively cutting timber, draining land or wetlands for growing agricultural products and otherwise engaging in the use of wetlands or other land for growing agricultural products shall be excluded from regulated activities and shall not require a permit under subdivision one hereof, except that structures not required for enhancement or maintenance of the agricultural productivity of the land and any filling activities shall not be excluded hereunder, and provided that the use of land designated as a freshwater wetland upon the freshwater wetlands map at the effective date thereof for uses other than those referred to in this subdivision shall be subject to the provisions of this article.

5. Public health activities. orders, and regulationts of the department of health shall be excluded from regulated activities. Copies of all such public health orders and

regulations affecting wetlands shall be filed with the department of environmental conservation. The commissioner may request modification of such orders or regulations if he deems such necessary to implement the policy of this article.

6. The commissioner shall review all current mosquito control projects to determine whether they are having any adverse impact on freshwater wetlands. Where any adverse impact is found, the Commissioner may require modification of such projects if he deems such necessary for the implementation of the policies of this article.

7. Where dredging or filling is in navigable waters of the state or is for the reconstruction or repair of certain dams and docks, and where such activity also affects freshwater wetlands, any person undertaking such activity must seek permisson under this article as well as under any other applicable law.

8. On any land that is being developed pursuant to a planned unit development ordinance or local law where freshwater wetlands are to remain as open space, development activities shall be permitted in areas contiguous to such wetlands if the local government affirms that such activities will not despoil said wetland.

§ 24-0705. Granting permits

1. In granting, denying or limiting any permit, the local government or the commissioner shall consider the effect of the proposed activity with reference to the public health and welfare, fishing, flood, hurricane and storm dangers, and protection or enhancement of the several functions of the freshwater wetlands and the benefits derived therefrom which are set forth in section 24-0103 of this article. The effects of the proposed activity shall be considered by the department or a local government, as the case may be, irrespective of political boundaries.

2. Duly filed notice in writing that the state or any agency or subdivision thereof is in the process of acquiring any freshwater wetlands by negotiation or condemnation shall be sufficient basis for denial of any permit. pursuant to section 24-0903 of this article within 24-0103 of this article.

3. No permit shall be granted under this section unless the proposed activity is consistent with the land use regulations applicable pursuant to section 24-0903 of this article within the boundaries of the local government involved and with the policy set forth in section24-0103 of this article.

4. In granting a permit, the local government or the commissioner may limit the same or impose conditions or limitations designed to carry out the public policy set forth in this article. The localgovernment or the commissioner may require a bond in an amount and with surety and conditions satisfactory to him securing to the state or local

government, as the case may be, compliance with the conditions and limitations set forth in the permit. The local government may suspend or revoke a permit if it finds that the applicant has not complied with any of the conditions or limitations set forth in the permit or has exceeded the scope of the activity as set forth in the application. The local government may suspend the permit if the applicant fails to comply with the terms and conditions set forth in the application. Department suspension and revocation proceedings shall be governed by the provisions of article 70 of this chapter and rules and regulations adopted there under and by the provisions of rules and regulations adopted by the department as provided in section 24-1301 of this article.

5. The local government or the commissioner shall state upon the record findings and reasons for all actions taken pursuant to this section

6. Review of the determination of the local government or of the commissioner shall be, within a period of thirty days after the filing thereof, pursuant to the provisions of title eleven of this article or article seventy-eight of the civil practice law and rules. Any owner of the wetland affected and any resident or citizen of the local government shall be deemed to have the requisite standing to seek review.

7. In the event that the court finds the action reviewed constitutes a taking without just compensation, and the land so regulated merits protection under this article, the court may, at the election of the commissioner, either (i) set aside the order or (ii) require the commissioner to proceed under the condemnation law to acquire the wetlands

or such less than fee rights therein as have been taken.

§ 24 1103. Powers

1. The board shall have power, and it shall be its duty:

a. To meet and function at any place within the state;

b. To adopt, promulgate, amend and rescind suitable procedural rules with respect to the functioning of the board and the setting of time limits for the hearing of appeals, the rendering of decisions thereon, and the filing of the determination, decision or order of the board with the clerk of the county in which the freshwater wetland is located;

c. To hear appeals by any party to any proceeding before the commissioner or local jurisdiction from all orders or decisions of the commissioner or local jurisdiction issued or made pursuant to this article, provided such appeals are commenced by the filing with the board of a notice of appeal within thirty days after service of such order or after notice of such decision given, as the case may be;

d. To review any decision or order of the commissioner or local government made pursuant to this article upon appeal therefrom by any person or municipal corporation affected thereby, providing such review is commenced by the filing with the board of a notice of review within thirty days after service of such order or notice of such decision given, as the case may be;

e. To receive briefs, and, where the board deems it advisable, to hear oral argument with respect to such appeals;

f. To require the submission to it by the commissioner or local jurisdiction of an original or certified copy of the entire record on which any order or decision appealed from is based, which record need not be reproduced;

g. To stay the effectiveness of any order or decision of the commissioner or local jurisdiction pending the determination of an appeal in proper cases and on such terms and conditions as the board may require.

2. The board may affirm, remand or reverse any order or decision of the commissioner or local government or remand the matter to the commissioner or local government for further proceedings in whole, or with respect to any part thereof, or with respect to any party, provided however that the board shall limit its review to whether the order or decision of the commissioner or local government is:

a. in conformity with the constituion of the state and the United States;

b. within the commissioner's or local government's statutory jurisdiction or authority;

c. made in accordance with procedures required by law or established by appropriate rules or regulations of the commissioner or local government;

d. supported by substantial evidence on the whole record; or

e. not arbitrary, capricious or characterized by abuse or discretion or clearly unwarranted exercise of discretion.

The commissioner or local government shall be bound by the decision of the board except to the extent such decision is reversed or otherwise modified by a court of competent jurisdiction pursuant to this article.

§ 24-1104. Special review of freshwater wetlands in Richmond countr [Eff. unlil June 30, 1992]

1. Notwithstanding any other provisions of this chapter, the board is hereby empowered to review the tentative or final designation or any order or decision of the commissioner pursuant to this article with respect to any privately owned parcel of land or part thereof owned on January first, nineteen hundred eighty-seven located in Richmond county which did not contain a designation as a freshwater wetland on the tentative freshwater wetlands map filed in the office of the clerk of Richmond county in nineteen hundred eighty-one. Upon the request of an [a]ffected landowner, the department shall make available any relevant evidence upon which it relied in adjudicating or will rely in defending the designation of a parcel as a wetland. The board shall schedule and hold a public hearing as soon as practicable but in no event more tban one hundred eighty days after receipt of a request for review of a designation of such property as wetlands, or of any order or decision of the commissioner pursuant to this article with respect to such property. The department in such hearing shall have the affirmative burden of demonstrating by a preponderance of the evidence that the parcel or part

thereof under review is a wetland. Beginning six months after the effective date of this section, the board shall issue its final decision within sixty days of the close of the record of the public hearing scheduled under this subdivision. The board, in exercising those powers specifically set forth in section 24-1103 of this article, shall review such designation to determine if there are unneceasary hardships in the application of such designation. If the board determines that such hardship exists, consistent with the declaration of policy contained in section 24-0103 of this chapter, the board may affirm, reverse, modify, or remand, with recommendations, the commissioner's designation, order or decision.

Notwithstanding the foregoing in the case of the owner of a privately owned paracel of land or part thereof which is not greater than ten thousand square feet in area, the board shall schedule a hearing within sixty days of receipt of a request for review of a designation of such property as wetlands or of any order or decision of the commissioner pursuant to this article with respect to such property. The department in such hearing shall have the affirmative burden of demonstrating by clear and convincing evidence that the parcel or part thereof under review is a wetland.

2. Within sixty days after tbe effective date of this section, the commissioner shall:

(a) cause a notice of the provision of this section to be published in at least two daily newspapers having a general circulation in the county of Richmond in excess of twenty thousand; and previously notified in writing of designation of freshwater wetlands in connection with a tentative freshwater wetlands map

filed in the office of the clerk of Richmond county in nineteen hundred eighty-six.

3. Nothing in this section shall be construed to abridge or deny any right or remedy available to any owner of any interest in a privately owned parcel of land or part thereof or to any permit applicant or to any project sponsor under any provision of law.

4. The provisions of this section do not apply to any parcel of land or part thereof, owned wholly or in part by any unit of government or agency or subdivision thereof, any authority or agency existing pursuant to governmental action, or subdivision thereof; including the state and city of New York.

§ 24-1105. Judicial Review

1. The institution of a judicial proceeding to review a determination or order of the commissioner or local government shall preclude the institution of a proceeding before the board to review such a determination or order. The availability of such review by the board shall not affect the right of any person to seek review of a determination of the commissioner or local government as provided in article seventy eight of the civil practice law and rules, and the limitations upon the availability of such remedy as prescribed in section seventy-eight hundred one of the civil practice law and rules shall not be applicable to applications for review of determinations and orders made pursuant to this article.

2. Any determination, decision or order of the board pursuant ~~to this~~ title may be judicially reviewed pursuant to article seventy eight of the civil practice law and rules in the supreme court for the county in which the freshwater wetlands affected are located,

within thirty days after the date of filing of the determination, decision or order of such board with the clerk of the county in which such wetland is located. The board shall be represented by the attorney general commencent of such judicial review; provided, however, that in instances in which the attorney general determines that its representation of the department or any other department or bureau of the state raises a conflict of interest, the board may be represented either by counsel to the board or by outside counsel.
(Ameded L.1987, c. 408, § 5 .)

ENVIRONMENTAL CONSERVATION
Art.52

1986 BOND ACT IMPLEMENTATION

TITLE 7—LAND ACQUISITION, FRESERVATION AND IMPROVEMENT PROJECTS

§ 52~0701. Approval and execution of state projects

1. State environmentally sensitive land projects and forest preserve projects shall be undertaken pursuant to the provisions of this article only with the approval of the commissioner.

2. The commissioner shall make an itemized estimate of funds or appropriations required annually for inclusion in the executive budget.

3. The commissioner shall, after hearings and prior to the approval of any environmentally sensitive land projects and forest presere projects, promulgate rules and regulations which shall include but need not be limited to: eligibility requirements, departmental ranking and review processes, project approval

guidelines and criteria and funding distribution for forest preserve projects and for each type of environmentally sensitive lands project as defined in subdivision four of section 52-0101 of this article.

4. Real property acquired with monies provided through this title shall not be sold or disposed of, or used for any purpose inconsistent with the natural resource value for which it was acquired, without the express authority of the legislature. Prior to the implementation of any sale, disposal, or change of use authorized by the legislature, the agency authorized to sell, dispose of or change the use of any such lands shall first provide substitute lands of equal fair market value, equivalent natural resource value and similarly suitable location as approved by the commissioner.

§ 52~0101. Definitions

As used in this article the following terms shall mean and include:

1. "Commissioner" means the commissioner of environmental conservation except that within and for the purposes of title nine of this article, the tern, shall mean the commissioner of parks, recreation and historic preservation.

2. "Cost" means the cost of an approved project, which shall include engineering and architectural services, plans and specifications, consultant and legal services, and other direct expenses incident to such project less any federal assistance received or to be received and any other assistance from responsible parties or otherwise.

3 "Department" means the department of environmental conservation.

4. "Environmentally sensitive lands project" means a state project to preserve aquifer recharge areas, areas of exceptional scenic beauty or exceptional forest character, open space, pine barrens, public access, trailways, unique character, wetlands, and wildlife habitat, as defined below:

(a) "Aquifer recharge area" means the location at which water can enter an aquifer directly or indirectly.

(b) "Exceptional forest character" means forest possessed of such attributes as maturity of growth, scientific harvesting potential, aesthetic appeal or recreational opportunity.

(c) "Exceptional scenic beauty" means land forms, water bodies, geologic formations and vegetation which possess significant scenic qualities or significantly contribute to scenic values.

(d) "Open space" means open or natural land in or near urban or suburban areas necessary to serve the scenic or recreation needs thereof.

(e) "Pine barrens" means a natural community of such biota as pitch pine, jack pine, and scrub oak which may be found associated with a variety of natural resources.

(f) "Public access" means access to lands for public use, including stream rights and waterways.

(g) "Trailways" means recreational trails developed under guidelines established for the development of a statewide trails system.

(h)"Unique character" means lands of special natural beauty, wilderness character, geological, ecological or historical significance suitable for the state nature and historic preserve and similar lands

within a forest preserve county outside the Adirondack and Catskill parks.

(i)'Wetlands" means freshwater wetlands as defined in article twenty-four of this chapter and tidal wetlands as defined in article twenty-five of this chapter.

(j) "Wildlife habitat" means specific areas essential for the conservation of threatened and endangered species which require special management considerations or protection for maintenance of such species.

5. "Federal assistance" shall mean funds available, other than by loan, from the federal government, either directly or through allocation by the state for construction or program purposes pursuant to any federal law or program.

6. "Forest preserve project" means a state project to acquire land as additions to the forest preserve or to acquire conservation easements created pursuant to title three of article forty-nine of this chapter within the Adirondack and Catskill parks.

7. "Governing body" means

(a) in the case of a town, a town board;

(b) in the case of a county outside of the city of New York, the county board of supervisors or other elective governing body;

(c) in the case of a city or village, the local legislative body thereof, as the term is defined in the municipal home rule law.

(d) in the case of a public benefit corporation, the board of directors, members or trustees thereof;

(e) in the case of a school district, the board of education thereof;

(f) in the case of a supervisory district, the board of cooperative educational services thereof.

8. "Hazardous waste" shall have thie definition set forth in title nine of article twenty-seven of this chapter.

9. "Hazardous waste site remediation project" means the same as tbe term "inactive hazardous waste disposal site remedial program" as defined in subdivision three of section 27-1301 of this chapter.

10. "Historic preservation project" means:

(a) State historic preservation projects. A state project undertaken by the office of parks, recreation and historic preservation to improve, restore or rehabilitate state historic properties listed on the state or national registers of historic places to protect the historic, cultural or architectural significance thereof.

CHAPTER X DIVISION OF WATER RESOURCES § 663.5

If proposed actvity is inconsistent wirth physical health, or with any related laws, regulations and govemment policies, this would weigh against issuing a permit under the act until such conditions were met that would make the proposed activity consistent with these provislons.

(2) Only practicable altemative. A proposed activity is the only practicable altemative if no other is physically or economically feasible. This does not, however, mean that the most profitable or least costly altemative is tbe only feasible one nor that the least profitable or more costly altemative is the only feasible one.

(3) Economic and social need. When the economic and social need for tbe proposed activity is consistent, the economic and social burden tbat would be

economic and social burden may inclute: associated services, such as sewer systems, schools, and fire and police protection, necessitated by the proposed activity; prevention of contamination, flood or other damage to the proposed development on the wetland by methods such as channelization, alteration of land, alteration of water flow, draining or construction of dams, dikes or levees; and/or services and repairs, such as medical care. pumping, cleaning, dredging and emergency assistance as a result of contamination, flooding or other damage to the proposed development of the wetland. Nothing in this section precludes the consideration of any issue which must be addresses under the State Environmental Quality Review Act (article 8 of the Environmental Conservation Law).

(4) Specific Class I standards. (i) ". . . reduction of which is acceptable only in unusual circumstances." Permits for the vast majority of actvities that could not avoid reducing a benefit provided by a Class I wetland would not be approved. The word *reduction* means that this applies not just to the loss of any benefit, but to the partial loss or reduction of a benefit.

(ii) ". . . satisfies a compelling economic or social need. . .." The word *compelling* implies that the proposed activity carries with it not merely a sense of desirability or urgency, but of actual necessity; that the proposed activity must be done; that it is unavoidable.

(iii) ". . . clearly and substantially outweighs. . . " *Clearly* means that the need for the proposed activity must outweigh the loss of or detriment to the benefits in a way that is beyond serious debate. *Substantially* carries this further, in that not only must the need clearly outweigh the loss or detriment, but the margin of outweighing itself must be large or significant.

COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Petition of
JULIA VITULLI ISGRO,
Petitioner,

Appellant's **JURISDICTIONAL STATEMENT**

-against-

Index No. 8511-95[1]

THE NEW YORK STATE FRESHWATER WETLANDS APPEALS BOARD,
Respondent.

Appellant, Julia Vitulli Isgro, within 10 days from the time of the taking of the appeal, files with the clerk two copies of this Jurisdictional Statement, with proof of service of one copy upon Respondent's Attorney. The statement includes the following information and exhibits:

[1] The title of the case is set forth above;

[2] Appeal is taken from the **Appellate Division, Second Department;**

[3] The **Notice of Appeal** was served upon Respondent's Attorney by certified mail and filed with the Supreme Court, Richmond County, on August 20, 1997;

[4] The **Decision and Order** appealed from and **Notice of its Entry** were served upon Appellant by Respondent on July 23, 1997 by first class mail; and

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[1] Appellate Division - Second Department's Docket No. 96-03063. Freshwater Wetlands Appeals Board's Docket No. 92-13.

[4] The **Decision and Order** appealed from and **Notice of its Entry** were served upon Appellant by Respondent on July 23, 1997 by first class mail; and

[5] Respondent's attorney is DENNIS VACCO, Attorney General of the State of New York, JOAN CORBO, Assistant Attorney General, Environmental Protection Bureau,120 Broadway, New York, New York 10271.

Legible copies of the following documents are provided as attachments to this Statement:

[1) The dated Notice of Appeal **[Exhibit A];**

[2] The Decision and Order appealed from **[Exhibit B];**

[3] No other Order was entered;

[4] No opinion or memorandum was issued by the Appellate Division;

[5] The Decision and Order reviewed by the Appellate Division **[Exhibit C];** and

[6] No formal or informal findings and conclusions upon which the Decision and Order were entered.

Initially, Appellant respectfully submits that the jurisdictional statutory authority for the matter before the Freshwater Wetlands Appeals Board is and was *ECL § 24-1104,* and includes, without limitation, the governing authority which requires that the Board deal with any matter before it in conformity with the constitution and the laws of the state and the United States.

The constitutional, statutory, case and/or other authority supporting the assertions by

Appellant that the Court has jurisdiction is provided as follows:

1. The Appellate Division, Second Department, denied Appellant due process by citing *Jorling v. Freshwater Wetlands Appeals Bd., 147 Misc. 2d 165* and *Matter of Jorling v. Freshwater Wetlands Appeals Bd.,147 Misc. 2d 880* without elaboration.

> [a] Based upon a review of the cited cases, it can be fairly concluded that the referred to cases are neither on point with respect to the facts, interest and position of the present parties, nor directed to the issues presented by Appellant to the Court for review.

2. The New York State Department of Environmental Conservation [DEC] implemented and is implementing *ECL Art. 24* in a manner which violates the due process clauses of the U.S. Const. amend. V and the N.Y. Const. art. 1, § 6, and the equal protection clause of the U.S. Const. amend. XIV.

> [a] The designation of Appellant's parcel [40x100] of land as 100% freshwater wetland was based upon the characteristics of the entire parcel-118 acres-known as NA-9 or Dongan Hill and not solely upon the characteristics of Appellant's parcel.
>
> [b] The DEC does not require prior pursuit of a permit application when it willingly, on its own initiative, purchases freshwater wetlands.

3. The Freshwater Wetlands Appeals Board, in its interpretation and application of *ECL Art. 24,*

including *§ 24-1104*, did not comply with the due process clauses of the U.S. Const. amend. V and the N.Y. Const. art. 1, § 6 and the equal protection clause of the U.S. Const. amend. XIV.

> [a] The Board used the "threshold" limitation as a jurisdictional limitation. However, since Appellant met the two jurisdictional factors required by § 24-1104, the Board was obliged to recite and consider Appellant's asserted hardship facts, namely, that the designation of Appellant's parcel [40x100] under consideration as freshwater wetland was based upon the characteristics of the entire 118 acre parcel known as NA-9 or Dongan Hill. It would have been a monumental and, indeed, impracticable task for Appellant to challenge the accuracy of that designation and one that would also require that Appellant trespass upon the private land of others. Furthermore, such activity would have exposed Appellant to potential criminal prosecution for disturbing the freshwater wetland in the process of determining the accuracy of the designation and compliance with the provisions of *ECL art.24*.
>
> [b] The Board denied Appellant the opportunity to participate in a bifurcated hearing which was available to all others and, thereby, violated the Equal Protection Clause.
>
> [c] Moreover, the Board cut-short appellant's cross-examination of the DEC's witness.

[d] The Board, during the cross-examination, incorrectly ruled that "Class" categories related to uses and, therefore, were not part of the designation process, notwithstanding the fact that the Designation Sheet referred to such uses.

4. The Supreme Court of the State of New York, County of Richmond, in its application of the provisions of *ECL Art. 24,* including *§ 24-1104,* and its application and treatment of due process, did not comply with the due process clauses of the U.S. Const. amend. V and the N.Y. Const. art. 1, § 6.

[a] Appellant has taken note of the fact that the Court of Appeals' opinion in *de St. Aubin v. Flacke,* 68 (NY2d 66) is cited in the Supreme Court's Decision. In the context of the presentation and citation of that decision, it appears reasonable to conclude that the Supreme Court was, indeed, also deciding that, in this case, Mrs. Isgro should have adopted the 'unique remedy' - the permit process - discussed by the Court of Appeals. *See also, Wedinger v.. Goldberger,* 71 N.Y.2d 428, *cert. denied,* 488 U.S. 850 (!988); see also *Spears v. Berle,* 48 N.Y.2d. 254,263 (1979); *Ellis v. Marsh,* 164 Misc. 2d 135 (1995]. Accordingly, the permit issue is now properly before this Court.

5. *ECL Art. 24* denies Appellant the benefit of the due process clauses of the U.S. Const. amend. V and the N.Y. Const. art. 1, § 6 and the benefit of the equal protection provided for by the U.S. Const. amend.

XIV, when it fails to provide constitutionally initiated and judicially established due process and equal protection in matters involving property.

> [a] The thirty [30] day time limitation for filing an appeal is inappropriate and unenforceable. The thirty day limitation, or any limitation, unlawfully prevents an owner of property from exercising a continuous right in such property. The unlawful interference with the exercise of such right was, is and will be a continuous injury. *Arnold v. Hudson River R.R. Co.*, 49 Barb. 106, decided December 23, 1873.
>
> [b] *ECL Art. 24* contains no authorization for review of designations before the Freshwater Wetlands Appeals Board, except for that found in *ECL § 24-1104*. It is noted that ECL § 24-1103 only authorizes the Board to hear appeals by any party to any *proceeding* before the commissioner from all orders or decisions of the commissioner. The designation process is and was not a *proceeding*.
>
> [c] *ECL Art. 24* does not provide an opportunity *to be heard* and *to hear why*, as required by the due process clauses of the U.S. Const. amend. V and the N.Y. Const. art. 1, § 6 and also denies the benefit of the equal protection provided for by the U.S. Const. amend. XIV. The failure to provide for such opportunity is particularly unfair and onerous when the owner of freshwater wetlands has been told that he or she has a heavy burden, that is, a burden beyond a reasonable doubt to establish the land

owner's right to recover for a taking, such as, flooding, of his or her property.

[d] The permit requirement and its process is no substitute for due process. It is respectfully noted that the burdensome, costly and protracted permit requirement, as a *sine qua non* prerequisite to addressing a taking claim by an owner of freshwater wetland, fosters an involuntary servitude upon the land which ultimately leads to an involuntary forfeiture of property rights by the owner.

[e] Moreover, it has been held that the denial of permit is not a taking. The owner must establish that no economically viable uses are available to the owner. Under equity, it is fair to concluded that an owner whose property is subject to ECL Art. 24 should share the burden of proof with the burden of the Regulatory Agency [DEC] to fully comply with the Article 24 and the State and Federal Constitutions. It is also respectfully submitted that, *ab initio*, one of reasonable and ordinary experience would fairly conclude that no economically viable uses are available to the owner, when the Court in *de St. Aubin v. Flacke, supra*, stated that 'wetland restrictions are far more stringent than most other regulations - restricting development *per se* -'.

6. *ECL Art. 24* violates the admonitions of the taking clauses of the U.S. Const. amend. V and N.Y. Const. art. 1, § 7[a] in its failure to provide for fair and

appropriate due process, including equal protection under the U.S. Const. amend. XIV.

> [a] The DEC and, therefore, the Commissioner have direct knowledge that Mrs. Isgro's land is being intentionally flooded for the benefit of the public and that no effectively simple remedy is provided for by *ECL Art. 24.*
>
> [b] Moreover, the Commissioner has the ability, which is provide by the N.Y. State Environmental Quality Bond Act [EQBA], to purchase 'wetlands', as he has done, without the requirement that the owner first pursuit the expensive, time consuming and burdensome permit process to secure the right to then sue for a taking.

7. Since N.Y. Const. art., § 7[d] declares the use of property for the drainage of land, such as, a swamp, to be a public use, is the use of appellant's private property by the public, for the drainage of a large, developed watershed also a public use and a public benefit which requires that the DEC *sua sponte* provide for appropriate compensation? Yes

As noted earlier, Appellant has served the Attorney General with this Jurisdictional Statement. Appellant also encloses a copy of the notification, including, a certification of the notification.

The notification and a copy of the 500.2 statement is, this day, also being sent to the Solicitor General, Department of Law, The Capitol, Albany, New York 12224.

Dated: August 27, 1997.

William Isgro

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September 10, 1997

Re: M/O Isgro v. NYS Freshwater Wetlands
Appeals Bd..

"Comments - Isgro"

Petitioner-Appellant Isgro respectfully submits that the established facts in this matter and the applicable law amply justify the retention of subject matter jurisdiction.

For completeness, Isgro respectfully directs attention to the chronological listing of the events leading up to this appeal. [Isgro Brief - pp.3-10]

The matter before this Court relates to property rights. Specifically, it relates to Isgro's right derived from her ownership of the property under consideration. That right includes the right to unencumbered possession, and use, and enjoyment of the benefits of her property in a manner corresponding to that which is available to the People of the State in their possession, use and enjoyment of their properties, and accords with the explicitly mandated rights and protections of the State and Federal Constitutions.

In response to the Court's invitation, the following additional comments are presented, without

limitation, as further cumulative justification for the retention of subject matter jurisdiction by this Court.

This appeal is the last step in the appeal process provided for by the State's Procedural Law. It is respectfully submitted that a denial of the opportunity for review of (1) the *process* set out by *ECL Art. 24* for the protection of the earlier referred to property rights and (2) the implementation of that *process* by the Board, the Supreme Court and the Appellate Division Second Department is also a denial of constitutional Due Process.

Notwithstanding our belief that the submitted Jurisdictional Statement effectively establishes the Court's subject matter jurisdiction, we provide, without limitation, the following additional points of justification:

1.) *Article 24* fails to set forth an early process, that is, a proceeding which provides for the constitutionally guaranteed due process right *to be heard* and *to hear why*. This also bears upon the permit process because this failure deprives one of the opportunity to be in possession of information [such as, finding that Mrs. Isgro's property was being intentionally flooded for a public purpose] necessary to arrive at informed decisions about issues, such as, the futility of applying for a permit and, indeed, the inability to state, as required in the permit process, that any reasonable use of our land would not be contra to the intent of *Article 24*;

2.) The thirty (30) day statute of limitation to appeal, set forth in *Article24*, is measured from the filing date of the *Final Richmond County Freshwater*

Wetlands Map. It is evident that the time limitation furthers no substantial, if any, State interest. In effect, the limitation misleads and interferes with an appeal of a constitutionally defined and protected continuous right to property. The thirty day limitation, or any limitation, unlawfully prevents an owner of property from exercising a continuous right in such property. *Arnold v. Hudson River R.R. Co.*, 49 Barb. 106, decided December 23, 1873. [Isgro Brief - p.27];

3.) *In the matter of Rappl & Hoenig Co., Inc. v. New York State Department of Environmental Conservation,* 419 N.Y.S. 2d 491, 47 N.Y. 2d 925, 393 N.E. 2d 485 the Court stated that "questions concerning the use of the property must be considered initially by the Department of Environmental Conservation ... within the confines of an application for a permit." However, not all issues of use are necessarily ripened through a permit process. For instance, the *Department,* through mere inspection of its experience and its particular knowledge of the freshwater wetland facts applicable to the parcel in question can determine that no uses are or would be available to the landowner because any reasonable use of the land would be inconsistent with the Statutory mandate (which indeed occurred through the testimony of the *Department's* expert in this matter).[Isgro Brief - p.31] Moreover, to require, under such circumstances, that Mrs. Isgro apply for a permit would certainly represent an exercise in futility. The law does not require that one undertake a futile mission. *Jorling v. Freshwater Wetland Appeals Board,* 534 N.Y.S. 2d 966,973.[Isgro Brief - p.31]

The Court in *Hage v. U.S.*, 35 Fed.Cl. 147,164 (1996) stated "[t]he court determines, analogous to *Stearns*, that plaintiffs need not apply for a permit if plaintiffs can establish that the procedure to acquire a permit is so burdensome as to effectively deprive plaintiffs of their property rights."

The Court in *Broadwater Farms Joint Venture v. U.S.*, 35 Fed.Cl.232, 236 (1996) stated "[t]his court has held that it is not necessary to apply for a permit if the process is so burdensome or futile that it 'effectively deprives the property of value.' *Hage v. United States*, 35 Fed.Cl.147,164 (1996)".

Isgro respectfully submits that it would be reasonable for one of ordinary and every day experience to conclude that the granting of a Permit to Mrs. Isgro would be inconsistent with the Class I designation because of the high Freshwater Wetland value assigned to her *Designated Land* and would also be inconsistent with the statutory purpose which includes the significant benefits and uses that the Freshwater Wetland *NA-9* provides to the People. Further, an applicant, such as Mrs. Isgro, would encounter difficulty in stating that conducting activities that others carry out on their land would be consistent with the statutory purpose.

Thus, for the reasons presented, the permit requirement denies or deprives Isgro of due process *ab initio*;

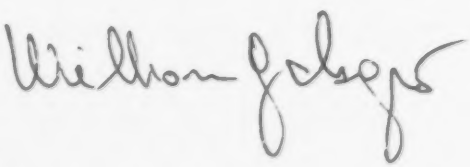
4.) " A takings claim is ripe when the issues are fit for judicial decision and hardships occur if the court declines to hear the claim. *Hage*, 35 Fed.Cl. at 163 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed. 2d 681(1976)." It is respectfully submitted that based upon the facts of the present case, a taking claim is ripe; and

5.) Under *ECL Art. 24* and its implementation, certain wetland owners are singled out and must bear all the burden for providing benefits, services and uses to the People. As to those owners, *ECL Art. 24* causes a significant, unfair and unwarranted servitude and an unconstitutional denial of equal protection under the 14th Amendment. Whereas, under the Environmental Quality Bond Act (EQBA), certain freshwater wetland owners receive compensation for a taking of a freshwater wetlands without the apparent need to apply for a permit.[Isgro Brief - p.35]

As additional references to the record demonstrating that a constitutional question was raised in the court or other forum of original instance, Isgro provides the following exemplars:

- Futility - [26a - ¶12];
- Permit Requirement - [Isgro Brief - p.48-penultimate ¶];
- Due Process denial - [34a ¶ 7];
- Equal Protection - [Isgro Brief - p.36-penultimate ¶];
- Regulatory (Statutory) Taking - [Isgro Brief - p.10];
- Invalidity of *ECL Article 24* - [Isgro Brief - p.12];
- Taking - [Isgro Brief - p.15, 33a ¶ 4];
- No economically viable uses - [34a ¶ 3];
- Collectively-Points I-VI - [Isgro Brief - pp. i-iii]; and
- Isgro's Reply Brief.

Respectfully,



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namely, the taking of property and the appropriateness of the process and means authorized by *ECL Art. 24* to implement the Legislative intent.

ARGUMENT

As hereinafter detailed, the matter before this Court, in its essence, comprises the creation of an involuntary servitude upon the *Designated Land*, which occurred immediately following the filing of the *R.C. Tentative Freshwater Wetland Map*, as directed by *ECL Art. 24*. Moreover, that involuntary servitude, by statutory design, fosters and implicitly induces and results in an involuntary forfeiture of rights inherently derived from Mrs. Isgro's ownership of her property, that is, *Lot 24*, the *Designated Land*.

Point I

Contrary to the admonitions of the taking clauses of the U.S. Const. amend. V and the N.Y. Const art. 1, § 7(a), *ECL Art. 24*, as implemented, has caused, as of the filing date of the Second Richmond County Tentative Freshwater Wetlands Map, which included Mrs. Isgro's Designated Land, an uncompensated and continuing regulatory taking of property, tangible (land) and intangible (services and benefits), notwithstanding any future amendment, rescission or declaration of unenforceability of *ECL Art. 24*. (*Regulatory Taking*)

In this litigation, Mrs. Isgro does and will maintain that a regulatory taking of her property (land) has occurred and continues to occur due to the designation of her land, *Lot 24*, as a freshwater

admission of public use. If that is so, it is also fair to conclude that no uses remain to the owner, because ownership excludes, based upon an owners right to exclude, the sharing of uses with others.

As stated by the Court in *Keystone Associates v. Moerdler, supra*, at page 190, "[i]f dedication and use for a public purpose is desired", as it appears with respect to Mrs. Isgro's *Designated Land*, "then just compensation must be paid."

Indeed, a physical taking of land and a regulatory taking of benefits and uses derived from the *Designated Land*, which inure as property to Mrs. Isgro from her ownership of the *Designated Land* and which represent valuable right(s), right(s) that she could have exercised for profit, have taken place through an unconstitutional intrusion.

Specifically, Mrs. Isgro respectfully submits that *ECL Art. 24* so affects the *Designated Land* that it thereby deprives Mrs. Isgro of the use and enjoyment of the *Designated Land.* Most significantly, the Freshwater Wetland Designation so impairs its value that it materially affects, and thereby nullifies, Mrs. Isgro's power to dispose of the *Designated Land* and deprives her of the right to disposition at will. *Keystone Associates v. Moerdler, supra* .

In support, Mrs. Isgro respectfully submits that the argument which follows establishes, among other facts, that *ECL Art. 24* is directed to a public use and purpose. Mrs. Isgro has owned and now owns *Lot 24*, a 40x100 lot, or the *Designated Land*, which is the subject of this appeal. *Lot 24* is *100% freshwater wetland.* [159a, 261a]

As evidence of a taking, Mrs. Isgro will first turn to ECL § 24-0103, which recites terms comprising a declaration of policy.

More particularly, §24-0103 reads as follows:

was not filed within thirty (30) days of the filing of the *R. C. Freshwater Wetlands Map*. However, Mrs. Isgro respectfully submits that no such appeal to the *Board* was or is available and, indeed, the thirty (30) day limitation is unenforceable.

(a) Thirty (30) Day Limitation For Filing An Appeal Is Inappropriate and Unenforceable.

The thirty (30) day statute of limitation to appeal is measured from the filing date of the *R. C. Freshwater Wetlands Map*. It is evident that the time limitation furthers no substantial, if any, State interest. In effect, it misleads and interferes with an appeal of a constitutionally defined and protected, continuous right to property.

The thirty day limitation, or any limitation, unlawfully prevents an owner of property from exercising a continuous right in such property. *Arnold v. Hudson River R.R. Co.*, 49 Barb. 106, decided December 23, 1873.

The subject matter of *Arnold v. Hudson R.R. Co.* was an easement, passed down by inheritance. The Court referring to the easement stated:

> that it was property within the meaning of Art. 1, section 6 of the Constitution, and, therefore, could not, nor could any portion of it, be taken for public use without compensation;.....that this right of enjoying such easement [property] was a continuous one, and the unlawful preventing its exercise was a continuous one and the unlawful preventing its exercise a continuous injury, and, that, therefore, the statute of limitations did not bar plaintiffs' claim for the injuries [taking] sustained.....

Mrs. Isgro respectfully maintains that *ECL Art. 24* is indefinite, confusing, subject to misapplication and misinterpretation and, thereby, denies Mrs. Isgro constitutionally guaranteed due process, such as, without limitation, *the right to be heard* and *the right to hear why* in a legal proceeding, Tribe, *American Constitutional Law* (2nd ed.. 1988), a proceeding in which the Commissioner (*Department)* has an initial burden of proof. *ECL Art. 24* denies Mrs. Isgro a viable and effective procedural mechanism to challenge, if deemed appropriate and required, the Commissioner's process leading to the designation. A permit mechanism is not an effective and appropriate substitute.

The omissions and inconsistencies, as discussed above, independently and cumulatively, render *ECL Art. 24* indefinite and confusing and, indeed, deny Mrs. Isgro a fair opportunity to understand *ECL Art. 24* and, thereby, secure protection for her constitutionally defined and protected property rights.

In the final analysis, the constitutionally protected opportunity to have a statutorily provided for due process hearing, '*to be heard* and *to hear why*' occurs only after the landowner undertakes an extremely burdensome, time consuming and financially draining permit process in which the landowner has the burden of proving facts that are best know to the *Department.* A delay which, when measured against its purpose, its reasonableness, its practical effect and operation, and measured against the burden other owners undertake in securing the benefits they enjoy for themselves and the uses they practice on their land, indeed, violates the due process clauses of the 5th Amendment of the U.S. Constitution and Article 1, § 6 of the N.Y. Constitution, as well as the equal protection provided for by the 14th Amendment of the U.S. Constitution.

It is evident that, at the outset, the Commissioner has unprecedented power (not an established right) which

apparently can only be challenged by the landowner in a complicated, cumbersome and financially draining permit process, and one in which the owner knows that, in view of the freshwater wetland characteristics, the granting of a permit would be inconsistent with the freshwater wetland policy established by the Legislature.

(d) Permit Requirement Is No Substitute For Due Process.

In the matter of Rappl & Hoenig Co., Inc. v. New York State Department of Environmental Conservation 419 N.Y.S. 2d 491, 47 N.Y. 2d 925, 393 N.E. 2d 485, the Court states that

> "[i]f it is determined that the property comes within the purview of the act, questions concerning the use of the property must be considered initially by the Department of Environmental Conservation ....within the confines of an application for a permit (ECL 24-0703, subd. 1; 24-0705, subd. 1). Review of such determinations may then be sought either administratively or in the Courts (§ 24-1105)". (Emphasis added).

This, however, does not appear to be correct, or at the very least is misleading. If true, arguendo, the benefit is misleading, because it is apparent that under § 24-0705(7) only a Court deals with a taking issue. This conclusion is supported by the *Board*. [210a] It is now apparent that this is the reason for the fact that the *Board* can not review *determinations.*

Addressing the Court's opinion above, the first question that presents itself, in view of the Court's holding, is

"how and by whom is the determination made that the property comes within the purview of the act." As discussed earlier, *ECL Art. 24* does not provide for a hearing which meets constitutionally mandated due process requirements and safeguards, as a means to come to such a *determination*, prior to the permit process.

Under the mandatory language "questions concerning the use of the property must be considered initially by the Department of Environmental Conservation ... within the confines of an application for a permit." Not all issues of use are necessarily ripened through a permit process. For instance, the *Department*, through mere inspection of its experience and its particular knowledge of the freshwater wetland facts applicable to the parcel in question can determine that no uses are or would be available to the landowner because any reasonable use of the land would be inconsistent with the Statutory mandate (which indeed occurred through the testimony of the *Department's* expert in this matter).

Moreover, to require, under such circumstances, that Mrs. Isgro apply for a permit would certainly represent an exercise in futility. The law does not require that one undertake a futile mission. *Jorling v. Freshwater Wetland Appeals Board*, 534 N.Y.S. 2d 966,973.

It is manifestly evident that the granting of a Permit to Mrs. Isgro would be inconsistent with the Class I designation due to the high Freshwater Wetland value assigned to the *Designated Land* and would also be inconsistent with the statutory purpose which includes the significant benefits and uses that the Freshwater Wetland *NA-9* provides to the People. Further, an applicant, such as, Mrs. Isgro, would encounter difficulty in stating that conducting activities that others carry out on their land would be consistent with the statutory purpose.

Since this case involves a substantive aspect of property interests inherited from the common law and embedded in the Federal and State Constitutions, Mrs. Isgro has the right not to be singled out for hurtful treatment, that is, deprivation of property by the State without a chance to *talk back* and *to be told why*. The permit procedure does not satisfy that requirement. *ECL Art. 24* imposes a wetland servitude which effectively invites actual physical invasion by third parties and ultimately leads to an involuntary forfeiture of property.

Nevertheless, Mrs. Isgro has been singled out for hurtful treatment which comprises deprivation of property in violation of the 'equal protection' provided by the 14th Amendment of the U.S. Constitution.

More particularly, Mrs. Isgro is a member, in the first instance, of a generic class which comprises "landowners". Within that class, there are subclasses which comprise, without limitation, landowners of (1) residential property, (2) commercial property, and (3) asserted freshwater wetland property. Except for the last class, each of the owner members in the other classes enjoys exclusive uses and benefits of his or her property for his or her private uses and benefits.

Furthermore, and significantly, within the class comprising wetland owners, there are several sub-subclasses.

One such sub-subclass owns land which merits protection and can recover by dedesignation or condemnation, as set forth in § 24-0705(7).

Another sub-subclass can, under the Environmental Quality Bond Act (EQBA), receive compensation for a taking of a freshwater wetlands.

Yet another sub-subclass, which includes Mrs. Isgro, does not receive compensation for taking of freshwater wetlands, apparently, due to the fact that its freshwater wetlands do not merit protection (§ 24-0705(7)). This sub-subclass must either accept an involuntary servitude and

forfeit property rights, or, notwithstanding an exhausting effort, persist in its attempt to secure constitutionally defined and protected property rights, which may be determined, with no certainty, only after much effort has been expended by the involved owner.

It should be noted that nowhere are the parameters set out for the standard, "the land so regulated merits protection under this article", in § 24-0705(7). In addition, it should also be noted that the *Department* created a quality grading system to choose among statutorily defined freshwater wetlands to ensure that the State consider for purchase with EQBA dollars only the highest quality wetlands. (See, generally, Transcript of the Assembly Debate, Bill No. 6645-A, Rules Report No. 596, June 19, 1987 at 98-100 [Transcript], and Environmental Quality Bond Act, Art. 51.)

Apparently, a wetland is not a wetland for all purposes, as it has been argued against Mrs. Isgro, particularly by the *Board*. There appears to be a difference which is undefined in *ECL Art. 24* and cannot be clarified by means now available to Mrs. Isgro, or at the very least applied to *Lot 24*.

It also appears appropriate, at this juncture, to challenge the enforceability of § 24-0705(7) based upon the holding in *First English Evangelical Lutheran Church v. Los Angeles County, supra*, which states as follows:

> We merely hold that where the government's activities have already worked a taking of all use of the property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

Stated in other words, compensation is still required for the period *ECL Art. 24* is or was law. It is evident that § 24-0705(7) makes no such provision.

Petition [20a-35a] comprised seventeen pages, and, as brief review shows and establishes, raises more than sufficient factually supported legal arguments to sustain the requested relief. Representative of those are the misinterpretation of § 24-1104 and the indefiniteness of the term 'wetland' in the context of the hearing over which the *Board* presided.

Mrs. Isgro has taken note of the fact that the Court of Appeals' opinion in *de St. Aubin v. Flacke*, 68 (NY2d 66) is cited in the *Court*'s Decision. In the context of the presentation and citation of that decision, it appears reasonable to conclude that the *Court* was, indeed, also deciding that, in this case, Mrs. Isgro should have adopted the 'unique remedy' discussed by the Court of Appeals.

Since it is fairly assumable that was *a holding by the Court below, that holding* is also appealed to this Appellate Court.

In summary, Mrs. Isgro's substantive and procedural positions in this matter have been expressed earlier in this Brief. Mrs. Isgro has established that the *Court* has denied her appropriate due process.

CONCLUSION

Mrs. Isgro respectfully requests that the Court *find :*

(1) that the *Board* denied Mrs. Isgro appropriate due process and equal protection under law and that the *Court* denied appropriate due process;

(2) that a taking of Mrs. Isgro's *Designated Land* has occurred, and continues to occur; and

(3) that just and fair compensation is due Mrs. Isgro, calculated from the date of the filing of the *Second R. C. Tentative Freshwater Wetlands Map* to the present, and is now payable, and payable, thereafter, until the taking ceases.

FINAL FRESHWATER WETLAND CLASSIFICATION

WETLAND NUMBER
NA-9

WETLAND NAME
- Dongan Hill

SIZE 118 acres .

CI.ASS I

COVERTYPES PRESENT (6 NYCFR 664.6(a))

Emergent Marsh	89 %
Wetland Open Water	11%

WETLAND BENEFITS (ECL 24-OlO5(7))

Flood and Storm Control	X
Wildlife Habitat	X
Pollution Treatment	X
Open Space / Aesthetic	X
Nutrient Source	X
Fish Habitat	X

WETLAND CHARACTERISTICS (6 NYCRR 664.5)

Class I

Residant Habitat of Endangered or Threatened Animal Specie	X

Class II

Associated with Permanent Open water outside the Wetland	X
Prevents Significant Flooding of a Lightly Developed Area	X
Within an Urbanized Area	X

APPENDIX H

Class III

Emergent Marsh with over 2/3 reeds or Purple Loosestrife	X
One of 3 Largest Wetlands of Same Covertype in Town	X

WETLAND INDICATOR PLANT SP$CIES PRESENT (ECL 24-0107.1)

Trees

Red Maple *Acer rubrum*	X
Willows *Salix spp.*	X
Silver Maple *Acer saccharinum*	X

Wetland Shrubs

Dogwoods *Cornus spp.*	X

Emergent Vegetation

Cattails *Typha spp.*	X
Arrowheads *Sagittaria spp.*	X
Reed *Phragmites communis*	X
Bur-reeds	

Sparganium ssp		X
Water Plantain		
Alisma plantago-aquatica		X
Free-floating Vegitation		
Duckweed		
Lemna spp.		X
Big Duckweed		
Wet Meadow Vegetation		
Sedges		
Carex spp.		X
Rushes		
Juncus spp.		X
Spikerush		
Eleocharis spp		X
Submergent Vegetation		
Pondweeds		
Potamogeton spp	X	
Elodea		
Elodea spp	X	

Other Wetland Indicator Plant Species
jewelweed, swamp rose mallow, arrowwood, smartweed, St. John's wort, cyperus, sensitive fern, cinnamon fern, bittersueet nightshade, elderberry, groundsel bush, royal fern, boneset

WILDLIFE SPECIES OBSERVED

eastern cottontail rabbit. Ameican crow, cardinal, eastern kingfisher. mallard duck. green-backed heron, red-winged blackbird. song sparrow, mockingbird. mourning dove, northern harrier, fish crow, blue jay, downy woodpecker, pheasant, house finch, American woodcock, common flicker.

With reference to *Lot* 24 and available uses, the *Department's* expert witness testified that

> "I have a problem just trying to figure out what you can do on that", the Designated Land, that is, Lot 24, "any development of Lot 24 would probably require a certain amount of fill in and retention of the filled area to support the structure." [261a-262a]

The *Departmen`s* witness, in discusang the wetland identifiod as *NA-9,* which includes the Designated Land, testificd, on cross-examination, as follows:

MR. ISGRO: What about a trespass? What about a trespass?

COMMISSIONER SPIERER: That has nothing to do with a wetlands permit.

MR. ISGRO: Okay. Fine.I gave you that but what about trespassing on someone else's land?

COMMISSIONER SPIERER: Okay.

MR. ISGRO: So I can't get on it, can I?

COMMISSIONER SPIERER: Well, if ycu get permission from the owner or -

MR. ISGRO: Do I have an obligation to get permission? I should be able to defend -

COMMISSIONER SPIERER: You're -

MR. ISGRO: -- a charge -- I'm sorry. I should be able to challenge this wetland designation and I have no opportunity to do so.
Why?
Because this wetland designation has notbeen made on the characteristics of my lot buthas been made on the characteristics of the whde block.

COMMISSIONER SPIERER: Ok

established by the people -

COMMISSIONER SPIERER: By what people?

MR. ISGRO: These people, the public at large as opposed to the owner, the people, the public, the same people that established the wetland provision -

COMMISSIONER SPIERER: But there are -

MR. ISGRO: That land is zoned for one, two or three-family homes.

COMMISSIONER SPIERER: Right.

But there are people who have properties in wetlands or adjacent areas that apply for permits from DEC and are granted permits even though they are wetlands and they provide benefits for the public at large.

DEC does grant permits to people to develop wetland or adjacent wetland lots.

MR. ISGRO: When that lot -- when that lot is dependent for its designation on lands to which it is connected as a wetland?

COMMISSIONER SPIERER: Yes.

Let me ask Joe.

So you got -- you got a system that probably in the 1970s was receiving a large amount of storm water from the center of the Island. And there has been a whole series of sewer construction that has probably altered the routes, but it's still now today receiving a significant amount of surface storm water during storm events and conveying it down to the Bay.

Q So I'm providing a very significant service to people -- well, to the people on the upper community.

A The area is functioning as a storm water retention area, yes.

Q And I have no control over that; not only that, but that land has been designated wetlands because of that and that gives me less control over that land if any control at all.

You don't have to agree with that.That's just--

With respect to Exhibit 38 and the roughly six pages that go with that, which is a document that was signed by Mr. Wayne Richter, which is the -

A It's the final classification sheet, yes.